**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**
**NOTICE OF MOTION NO.301 OF 2006**
**IN**
**SUMMARY SUIT NO.5279 OF 1998**

Rajinder Singh Gulati ...Plaintiff

vs.

Sunil Mehra ...Defendant

Mr.K.T.Kukreja i/b M/s.Kukreja & Co. for the Plaintiff
Mr.M.M.Vashi for the Defendant

**CORAM: A.S.OKA,J.**
**DATE : MARCH 13,2007**

**P.C.:**

1. I have heard Shri M.M.Vashi learned Counsel for the Defendant in support of the Notice of Motion and Shri Kukreja appearing for the Plaintiff for opposing the Notice of Motion.

2. To appreciate the submissions made by the learned Counsel for the parties, it will be necessary to briefly refer to the relevant facts.

3. The plaintiff filed a summary suit against the Defendant praying for a decree in the sum of Rs.12,00,000/- as per the particulars of the claim annexed to the plaint with further interest on the said amount at the rate of 18% p.a. On 8th December 2004, the parties filed minutes of decree on admission and this Court passed a decree in terms of the said minutes. It will be necessary to reproduce the relevant clauses of the minutes of decree on admission.

"(1) Decree on Admission for Rs.12,00,000/- with interest on Rs.12,00,000/- @ 18% P.A. from the date of filing of the suit till payment and cost of the suit against the Defendant and in favour of the Plaintiff.

2(a) In the event of the Defendant paying to the Plaintiff a sum of Rs.12,00,000/- (Rupees Twelve Lacs only) by monthly instalment of Rs.1,00,000/- as mentioned in clause 2(b) below, then and in that event only the decree to be marked fully satisfied.

2(b) The first instalment of Rs.1,00,000/- shall become due and payable on or before 1-4-2005 and the subsequent monthly instalment of Rs.1,00,000/- shall become due and payable on or before the seventh day of each succeeding month thereafter without committing any two defaults or last default.

(3) In the event of the Defendant committing any two defaults or the last default in payment of Rs.12,00,000/- by monthly instalment or Rs.1,00,000/- as aforesaid, then and in that event, the Plaintiff shall be at liberty to execute the Decree for the entire decretal amount or the balance thereof remaining due and payable as mentioned in clause (1)

above."

4. The present Notice of Motion is filed by the Defendant praying for following reliefs :

"(a) That two defaults committed by the defendant in paying the two instalments of Rs.1 lack each to be paid on or before 7.11.2005 and 7.12.2005 be condoned and the Plaintiff be order and directed to accept two cheques handed over by the Plaintiff vide Defendant’s covering letter dated 19.12.2005 without insisting on the payment of full decretal amount.

(b) That pending the hearing and final disposal of the Notice of Motion, insolvency Proceedings taken out by the Plaintiff i.e. Insolvency Notice No.N/257 be stayed.

(c) that ad-interim relief in terms of prayer clause (b) be granted.

(d) costs of the Notice of Motion provided for."

(e) Such other and further reliefs be granted as the court may deem fit to grant."

5. It is stated by the Defendant in the Affidavit in support of the Notice of Motion that on 26th July 2005, on account of heavy rain in Mumbai, his godown premises were damaged resulting into loss of more than 10,00,000/-. According to the Defendant though a claim was made with Insurance Company, the same has been rejected by the Company. The case made out in the Affidavit in support of the Notice of Motion is that he could not pay the instalments payable as per the decree on admission for the months of November and December 2005 on or before the 7th day of respective months. It is stated that the along with the covering letter dated 19th December 2005, he forwarded two cheques in the sum of Rs.1,00,000/- each to the Advocate for the Plaintiff. A reply was sent by the Plaintiffs' Advocate on 21st December 2005, taking a stand that in view of the two defaults committed by the Defendant, he has become liable to pay the full amount as provided in the decree.

6. A reply is filed by the Plaintiff opposing the Notice of Motion. In paragraph 4-A it is stated that the Defendant committed two defaults and therefore the balance decretal amount became due and payable forthwith. It is stated that on 17th December 2005, the Plaintiff issued insolvency notice which was attempted to be served to the Defendant on 19th December 2005. It is contended the Defendant avoided the service of notice and on the same day two cheques in the sum

of Rs.2,00,000/- were forwarded by the defendant to the Plaintiff's Advocate along with a covering letter. On 23rd December 2005, the Defendant was served with the duplicate insolvency notice. According to the case of the plaintiff, on failure of the Defendant to comply with the requisition in insolvency notice within a period of 35 days and failure to apply for setting aside the insolvency notice within the period of 35 days, the Defendant on 28th February 2006 committed an "act of insolvency." It is pointed out that insolvency petition is pending for adjudication. It is contended that while consenting to the court for granting decree on admission, the Plaintiff has given concession in favour of the Defendant.

7. Shri Vashi for the Defendant submitted that it appears that both the parties have proceeded in this Notice of Motion on the footing that the decree is passed by the consent of the parties. He submitted that in fact, the decree has been passed under the provisions of Rule 6 of Order XII of the Code of Civil Procedure,1908 on admission. He submitted that there is a power vesting in this Court for extending the time to comply with the terms of the decree. He has placed reliance on the decision of the learned Single Judge of this Court in case of Marketing and Advertising Associates Pvt.Ltd. Vs. Telerad Pvt. Ltd. (A.I.R. 1969 Bombay page 323) as well as a decision in the case of Shamrao Jayaram Arbhat Vs. Uttam

Bhomaji Modak (1983 Mh.L.J. page 309). He has also placed reliance on the decision of the Apex Court in case of Smt. Periyakkal and others vs. Smt.Dakshyani (A.I.R. 1983 S.C. page 428). He submitted that the defaults made earlier were condoned by the Plaintiff by accepting the payments. Therefore, the question involved is only of condoning the default in payment of last two consecutive instalments. He invited my attention to the observations made by this Court while passing an ad-interim order on 13th February 2006. He submitted that under section 148 of the said Code, this Court can always extend the time and in the present case, the time is required to be extended as the defendant has suffered a huge loss due to unprecedented flood situation in the city of Bombay on 26th July 2005.

8. The learned counsel for the Plaintiff relied upon the decision of Full Bench of this Court in case of Waman Vishwanath Bapat Vs. Yeshwant Tukaram (A.I.R.(36) 1949 Bombay page 97). He also invited my attention to the relevant part of the decision of the Apex court in case of Smt.Periyakkal and others (supra). Lastly, he placed reliance on the decision of the learned Judge of this court in case of Durga Mohan Joshi Vs. International Metal Industry and others. (A.I.R. 1984 Bombay page 314) and submitted that this court has no power to extend the time provided for payment of instalments unless there is a consent of the Plaintiff and the

Plaintiff herein is not willing to give a consent. He therefore, prayed for dismissal of the Notice of Motion.

9. I have considered the submissions. Under the decree on admission, the Defendant agreed to pay a sum of Rs.12,00,000/- by monthly instalment of Rs.1,00,000/-. The first instalment became payable on or before 7th April 2005 and it was provided that the subsequent instalment of Rs.1,00,000/- each shall become due and payable on or before 7th day of each succeeding month thereafter without committing default.

10. Exh.A-1 to the Affidavit in support of Notice of Motion is a chart annexed by the Defendant showing the details of instalments paid. The said chart shows that from April 2005 till end of October 2005 instalments were never paid on or before 7th day of month as provided in the decree. Instalment for November 2005 was not paid and instalments of November and December were sought to be paid by a cheque issued on 19th December 2005. Thus, instalments for the months of November 2005 and December 2005 were admittedly not paid on or before 7th day of the respective months.

11. It is necessary to refer to the relevant statutory provisions. The first provision is Rule 11 of Order XX of the Code of Civil Procedure, 1908 which reads thus :

11. Decree may direct payment by instalments.-

(1) Where and in so far as a decree is for payment of money, the Court may for any sufficient reason [incorporate in the decree, after hearing such of the parties who had appeared personally or by pleader at the last hearing, before judgment, an order that] payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) Order, after decree, for payment by instalments -

. After the passing of any such decree the Court may, on the application of the judgment debtor and with the consent of the decree-holder, order that payment of the amount decree shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or taking of security from him, or otherwise, as it thinks fit.

12. Sub section 1 of Rule 11 provides that where a decree is to be passed for payment of money, the court may for any sufficient reason incorporate in the decree that the payment

of amount decreed shall be postponed or shall be made by the instalments with or without interest notwithstanding anything contained in the contract between the parties under which the money is payable. Under sub rule 2 of Rule 11, after passing of the decree, on an application made by the Judgment Debtor and with the consent of the Decree Holder the court has a power to order that the payment of the amount shall be postponed or shall be made on such terms as to the payment of interest, the attachment of the property or taking of security. In the present case, admittedly, the Plaintiff has not consented.

13. Reliance was placed upon section 148 of the said Code. In behalf it will be necessary to refer the decision of the Apex Court in case of Smt.Periyakkal and others (supra). In the case before the Apex Court, the Respondent was the Plaintiff who filed a money suit against the husband of the first Appellant. The suit was decreed. In execution of the decree, property was brought to sale. The decree holder purchased the property. Some of the Appellants filed an application under Order XXI Rule 90 of the said Code for setting aside the sale on various grounds. The Application came to be dismissed by the Executing Court. In the Appeal preferred by the Appellants, the sale was set aside. In a Second Appeal there was a compromise. As per the terms of the compromise, the Appellants before the Apex Court agreed to

deposit and the Respondent agreed to receive a sum of Rs.60,000/- in full and final settlement of the decree. It was provided that if the deposit was made on or before November 30, 1976, the sale which though confirmed by the Trial Court but set aside by the Appellate Court was to stand set aside and the Second Appeal of the Respondent was to stand dismissed. It was provided that if the amount of Rs.60,000/- was not deposited on or before November 30,1976, the Second Appeal was to stand allowed and the sale was to stand confirmed. It appears that the Appellants filed an Application under the provision of section 148 read with section 151 of the said Code to extend the time for depositing the sum of Rs.60,000/-. The High Court dismissed the Application on the ground that the Court could not extend time where the time has been stipulated by the parties themselves in the compromise arrived at between them.

14. The Apex Court dealt with its earlier Judgment in case of Hukumchand Vs. Bansilal (A.I.R. 1968 S.C. page 86). The Apex Court dealt with the powers of the court to extend the time for depositing the amount. While dealing with the said powers the Apex Court held thus :

"....The parties, however, entered into a compromise and invited the Court to make an order in terms of the compromise, which the Court did. The time for deposit

> stipulated by the parties became the time allowed by the Court and this gave the Court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. **True, the Court would not rewrite a contract between the parties but the Court would relieve against a forfeiture clause; And, where the contract of the parties has merged in the order of the Court, the Court's freedom to act to further the ends of justice would surely not stand curtailed.** Nothing said in Hukumchand's case militates against this view. We are, therefore, of the view that the High Court in error in thinking that they had no power to extend time..." (Emphasis added)

15. Thus, the Apex Court held that in case of consent decree, time stipulated by the parties becomes the time allowed by the court and this gives the jurisdiction to the court to extend the time in appropriate cases. It was held that the time could not be extended ordinarily nor for the mere asking and it would be extended in rare cases to prevent the manifest injustice and to give relief against forfeiture. It was held that the Court could not rewrite the contract between the parties but the Court will rely upon the forfeiture clause; and where the contract of the parties has been merged in the order of the Court, the Court's freedom to act to further the

ends of the justice would surely not stand curtailed. Therefore, the Apex Court held that the High Court was in error in holding that it had no power to extend the time.

16. The said decision has been considered by the learned Single Judge while deciding the case of Durga Joshi (supra). This was a case where the Plaintiff had filed a suit for recovery of certain amount along with interest. The suit was a summary suit. On the basis of the minutes of the decree filed by the parties, a decree on admission as prayed was granted in favour of the Plaintiff. It was provided in the Decree that if the Defendants pay to the Plaintiff a sum of Rs.4,21,000/- with interest at the rate of 6% p.a. by monthly instalments as provided thereunder the decree was to be marked as fully satisfied. It was provided that if the Defendant committed any default in payment of any instalment, the Plaintiff was to execute the decree forthwith. In the said suit, a Chamber Summons was taken out by the defendant asking for extension of time for the payment of monthly instalments under the said decree. The Chamber Summons was opposed by the Plaintiff. The learned Single Judge relied upon the decision of the Full Bench of this Court in case of Waman Bapat (supra). The Division Bench in the case of Waman Bapat (supra) observed that in a decree which is passed either by consent or in invitum, if there is any provision for payment of decretal amount by instalments and there is also a

provision that on failure to pay one or more instalments, the whole amount of decree becomes payable at once, the courts are bound, in the event of such failure, to execute the decree in accordance to its terms and are not at liberty to relieve the Judgment Debtor against the consequences of failure on the equitable considerations. The full Bench observed that such a provision in decree was not a penal provision. The learned Single Judge in the facts of the case held that the provision in the decree for payment of a lesser sum by instalments was a concession and therefore intervention cannot be made on equitable grounds. The learned Single Judge also dealt with the argument made on behalf of the Defendant that under section 148 read with section 151 of the said Code, there is a power in the court to grant extension of time for payment of instalments under the decree. The learned Single Judge dealt with various decisions and in paragraph 8 and 9 of the Judgment held thus :

"8. These decisions, therefore, do not support the proposition that, provisions of section 148 or principles of equity can be applied to the provisions of a decree (except a preliminary decree). **The only instance where a decree can be altered by the court on grounds of equity are instances where relief is sought against penalty or forfeiture.**

9. It is also not possible to invoke the inherent power of the court under Section 151 of the C.P.C. because the power under section 151 cannot be resorted to in order to achieve a result which is not permitted by the express provisions of the Code. In view of the provisions of Order XX Rule 11 sub rule (2) of the C.P.C., the court cannot grant any further extension of time after the passing of the decree without the consent of the decree holder. The provisions of section 151 cannot be resorted to for the purpose of overcoming the bar of Order XX Rule 11 (2)."

17. It must be noted here that the learned Single Judge in the aforesaid decision also considered the decision of the Apex Court in case of Smt.Periyakkal and others.

18. Learned Counsel for the defendants placed reliance on the decision of Shamrao Jayaram (supra). The question before the learned Single Judge was "Does section 74 of Indian Contract Act operate also upon the consent decree ?" A perusal of the said decision shows that the question whether the court can exercise power under section 148 and/or section 151 of the said Code for extending the time fixed under the Decree on admission was not considered. The learned Counsel for the Defendant also placed reliance on a decision of another learned Single Judge in case of Marketing and Advertising

Associates Pvt.Ltd. (supra). He pointed out that the learned Single Judge held that there was no distinction between section 148 of the said Code and Rule 7 of the Companies (Court) Rules, 1959. It must be noted here that in the said case before the learned Single Judge, a consent order was passed on a Petition for winding up filed under the Companies Act,1956. Perusal of the paragraph 6 of the said decision shows that the learned Single Judge held that the jurisdiction under Rule 7 of the said Rules can be exercised even though it was a self operative order and the time fixed to deposit the amount had already expired as the Court was still seized of the case and had not become functus officio. Considering the fact that the court had not become functus officio, it was held that the power to extend the time under Rule 7 can be exercised.

19. Lastly, it will be necessary to refer the decision of the Full Bench of this Court in case of Waman (supra). In the said decision the Full Bench held that the Court of equity can relieve the Defendant against the penalty or against the forfeiture. It was held that when the obligation undertaken by the Defendant was the result of a concession given by the decree holder, the Judgment Debtor was not entitled to relief against the breach committed by him. Same is the case in the present notice of motion.

20. As pointed out earlier, time cannot be extended by exercising power under sub rule 2 of Rule 11 of Order XX of the said Code. As held by the learned Single in case of Durga Joshi (supra), in the facts of this case section 148 or section 151 cannot be invoked for extending the time as it is not permissible to alter the decree on the ground of equity. This is not a case where relief is sought against a penalty or forfeiture. The Plaintiff has granted a concession to the Defendant to pay a lesser amount by instalments. In this case there is no penalty or forfeiture provided in the decree.

21. Again turning back to the facts of the case, even going by the chart annexed as Exh.A 1, the Defendant never paid instalments on or before 7th day of every calendar month. Moreover, there is clear default for the last two months i.e. November and December 2005. Apart from this fact, it is very difficult to accept the submission that the defaults were condoned by the Plaintiff. The fact remains that there is a clear default in making payment of instalments of last two consecutive months. Reliance placed on order dated 13th February 2006 will not help the Defendant as the observations made therein are for a limited purpose of considering the prayer for ad-interim relief.

22. In this view of the matter, the prayer for extension of time cannot be acceded to and the Notice of Motion is

accordingly dismissed.

23. At this stage, Shri Vashi learned Counsel for the defendant prays that ad-interim relief granted by this Court on 13th February 2006 be continued for a reasonable period. The said prayer is opposed by the learned Counsel for the Plaintiff.

24. Considering the facts and circumstances of the case, ad-interim relief granted on 13th February 2006 will continue to operate for a period of eight weeks from today.

**JUDGE**